(4)

No. 91-717

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

DOMINIC SENESE and JOSEPH TALERICO,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF RESPONDENT CHARLES M. CARBERRY IN OPPOSITION

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QUESTION PRESENTED

Whether the decision by union officials, appointed pursuant to a consent decree settling litigation between the union and the United States, to enforce provisions of the union constitution against petitioners is governmental action in violation of the First, Fifth and Eighth Amendments to the Constitution.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1-25) is reported at 941 F.2d 1292. The district court's opinion entered on August 27, 1990 (Pet. Supp. App. 1-47), is reported at 745 F. Supp. 908, and the district court's supplemental opinion entered on December 28, 1990 (Pet. Supp. App. 48-61), is reported at 753 F. Supp. 1181.

JURISDICTION

The court of appeals' order was entered on August 6, 1991. The petition for a writ of certiorari was filed on October 30, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT

1. In June 1988, the United States filed a civil action under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*, against the International Brotherhood of Teamsters (IBT) and members of the IBT General Executive Board. (Pet. App. 4.) The complaint alleged that the IBT had long been under the control of organized crime, and sought equitable relief to rid the union of such control. *See United States v. International Bhd. of Teamsters*, 905 F.2d 610, 612-613 (2d Cir. 1990). In March 1989, the parties agreed to settle the action and stipulated to the entry of a consent decree incorporating the terms of their settlement agreement. (Pet. App. 4-5); (C.A. App. A135-A165); (text of consent decree).

The principal goal of the settlement and consent decree is to wrest the union from the influence of organized crime and establish a new system of rank-and-file elections of IBT officers. (Pet. Supp. App. 3); (Consent Decree 2); *United States v. International Bhd. of Teamsters*, 931 F.2d 177, 180-81 (2nd Cir. 1991); *United States v. International Bhd. of Teamsters*, 764 F. Supp. 787, 788 (S.D.N.Y. 1991), *aff'd mem.*, 940 F.2d 648 (2d Cir. 1991), *cert. denied*, 112 S.Ct. 76 (1991). As provided by the consent decree, the district court appointed three officers from a list of names jointly submitted by the parties: an Independent Administrator, an Investigations Officer and an Elections Officer. (Pet. App. 5). These officers exercise powers delegated to them by union officials under the terms of the settlement. The Independent Administrator oversees the activities of the other two officers and the union's internal disciplinary affairs. (Pet. App. 5, 12). The Investigations Officer investigates and prosecutes disciplinary charges against IBT members for violations of the union constitution. The Elections Officer is responsible for oversight and certification of the 1991 election process. (Pet.

App. 5-6). The IBT pays the salaries of the court-appointed officers. (Pet. App. 13). The authority of the Independent Administrator and Investigations Officer, with certain limited exceptions, will expire in 1992, nine months after certification of the results of the recent election for union officers. (Consent Decree 3).

Under the decree, a party facing a disciplinary charge brought by the Investigations Officer has the right to notice and a hearing before the Independent Administrator. (Consent Decree 9). The hearings are conducted in the same manner as labor arbitration proceedings. (Pet. Supp. App. 7). The administrator's decision is then subject to review by the district court. (Consent Decree 10). The decree states that in reviewing such decisions, the district court shall apply the same standard of review a federal court applies to administrative decisions under the Administrative Procedure Act. *Id.* at 25.

The consent decree enjoins any union member from knowingly associating with "any member or associate of the Colombo Organized Crime Family of La Cosa Nostra, the Genovese Organized Crime Family of La Cosa Nostra, the Gambino Organized Crime Family of La Cosa Nostra, the Lucchese Organized Crime Family of La Cosa Nostra, the Bonnano Organized Crime Family of La Cosa Nostra, [and] any other Organized Crime Families of La Cosa Nostra or any other criminal group." (Consent Decree 6). The consent decree specifically provides that "[t]he IBT Constitution shall be deemed and hereby is amended to incorporate and conform with all of the terms set forth in this order." (Consent Decree 5).

2. The Investigations Officer filed disciplinary charges against petitioners for violation of Article II, § 2(a) of the IBT Constitution, which has long required every member to conduct himself in a manner which will not "bring reproach upon the union." (Pet. App. 6 & n.1). The charges were based, in part, upon petitioners' knowing

association with the members of La Cosa Nostra. Charges against petitioner Talerico were also based upon his unlawful refusal to answer questions before a federal grand jury investigating "skimming" from a Las Vegas casino. Talerico served time in prison for civil and criminal contempt resulting from his refusal to testify. (Pet. App. 6-11); (Pet. Supp. App. 34-35).

Petitioners sought a hearing before the Independent Administrator (IA). The IA held a hearing, and after review of the record and memoranda submitted by counsel, issued a 42-page opinion sustaining the charges against petitioners. (Pet. App. 7-8). He found that petitioners' knowing contacts with organized crime figures were "purposeful and not incidental or fleeting." (C.A. App. A1201). As to Talerico, the IA relied in particular on evidence that Talerico had traveled on a number of occasions under an assumed name to meet an organized crime figure and exchange packages or envelopes with him. (C.A. App. A1205). In addition, the IA emphasized that Talerico's "refusal to testify was especially iniquitous" because Talerico had previously been granted immunity. (C.A. App. A1196). As to Senese, the IA found, based on a review of the extensive evidence (C.A. App. A1188-A1190), that Senese "was and is a member of La Cosa Nostra and that Senese has knowingly associated with members of La Cosa Nostra." (C.A. App. A1192). As a sanction for violation of the IBT Constitution, the IA expelled petitioners from the IBT and prohibited them from drawing any funds from the IBT or its affiliates. (Pet. App. 8).

3. The IA's decision was submitted to the district court for review. The district court determined that the sanction was both supported by the evidence and consistent with the IBT Constitution. (Pet. Supp. App. 25-47). The district court also rejected petitioners' contentions that the sanction violated their First Amendment freedom of association rights and their Fifth Amendment due process

rights. Citing the fact that the union's stated policy, embodied in the consent decree, was to be free of organized crime influence (Pet. Supp. App. 12), the court held that a union can sanction its members for knowingly violating such a policy. The court also found that the consent decree "created no new standards of conduct for IBT members," but rather put into effect a longstanding policy of both the IBT and of the AFL-CIO, with which the IBT is affiliated, "to be free of all corrupt influence." (Pet. Supp. App. 17). Any past laxness in enforcing that policy did not deprive petitioners of fair notice that associating with organized crime figures violated union standards of conduct. (Pet. Supp. App. 18).

4. The United States Court of Appeals for the Second Circuit affirmed. The court rejected petitioners' constitutional challenges on two independent grounds. First, the court held that the disciplinary actions of the court-appointed officials did not constitute governmental action subject to constitutional constraints. (Pet. App. 11-17). The court found that the actions of the Investigations Officer and the IA were based upon the IBT Constitution, not any state or federal authority, and therefore did not constitute governmental action under this Court's precedents. *Ibid.*

Second, the court of appeals held that, even if the administration of internal union disciplinary proceedings could be characterized as governmental conduct, petitioners had not alleged any constitutional violations. (Pet. App. 17). The court held that petitioners' First Amendment right to associate with known members of organized crime did not outweigh the need of both the union and the public to eliminate the influence of organized crime on labor unions. (Pet. App. 17-19). The court further found that the claim that it violated due process to punish petitioners for their pre-decree association with organized crime was "meritless." (Pet. App. 20). The court of appeals agreed with the district court's conclusion that the

decree "simply made explicit the longstanding goal of the IBT to be free of corruption," *ibid.*, and observed that the petitioners did not dispute the fact that the evidence that formed the basis for the disciplinary sanctions was reliable. (Pet. App. 21).

REASONS FOR DENYING THE WRIT

The decision below is correct. It does not conflict with any decision of this Court or any other court of appeals. Because the issues presented by petitioners are fact specific and the authority of the IA and Investigations Officer will expire this year, this case presents no issue of continuing importance warranting further review by the Court.

I. THE SECOND CIRCUIT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *EDMONSON v. LEESVILLE CONCRETE CO., INC.*, 111 S.Ct. 2077 (1991)

Each of the constitutional provisions invoked by petitioners requires action by the government. *E.g.*, *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982). To qualify as state action, the deprivation at issue must first have "resulted from the exercise of a right or privilege having its source in state [or federal] authority." *Edmonson v. Leesville Concrete Co., Inc.*, 111 S.Ct. 2077, 2082-83 (1991). Second, the party charged with deprivation of a constitutional right "must be a person who may fairly be said to be a state actor." *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937 (1982). The Second Circuit properly concluded that neither of these criteria was satisfied by the IA's imposition of sanctions on petitioners.

First, the sanctions on petitioners did not result from the exercise of a right or privilege having its source in governmental authority. Petitioners were charged with violations of the union's constitution, not with violations of any state or federal law. (Pet. App. 6-8). Similarly,

the IA's authority to impose the sanctions stemmed from the Post-Decree amendments to the IBT Constitution, which established the IA and empowered him to oversee the IBT's internal disciplinary affairs, *see United Staies v. International Bhd. of Teamsters*, 905 F.2d 610, 622-23 (2d Cir. 1990), and not from any provision of state or federal law. Accordingly, the court of appeals correctly recognized that these internal union disciplinary proceedings cannot constitute governmental actions under this Court's precedents. *E.g., Blum v. Yaretsky*, 457 U.S. 991 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

Second, the IA is not a "state actor" but a private actor substituting for IBT officials who ordinarily would exercise disciplinary authority. Although appointed by the district court, the IA is not an officer of the government but an independent officer paid by the IBT. As the Second Circuit previously recognized, he acts in place of the IBT General President and General Executive Board ("GEB") for purposes of conducting disciplinary proceedings and imposing disciplinary sanctions. *United States v. International Bhd. of Teamsters*, 905 F.2d at 618, 623 ("the IBT merely exercised its discretionary authority under the [IBT] Constitution to delegate the investigation and discipline of union misconduct to court-appointed officers"); *accord United States v. International Bhd. of Teamsters*, 745 F. Supp. 189, 191 (S.D.N.Y. 1990) ("The Independent Administrator and Investigations Officer are stand-ins for the General President and GEB for the purpose of the instant disciplinary actions."). That the Administrator was appointed by the district court does not transform him into a state actor for constitutional purposes. *Cf. Polk County v. Dodson*, 454 U.S. 312, 319 (1981) (state-paid public defender was not acting as a state agent when she declined to prosecute the defendant's appeal, because she was acting on the defendant's behalf as a defense lawyer, "a private function, traditionally filled

by retained counsel, for which state office and authority are not needed"). Nor does the district court's authority to review the IA's determinations—an authority that would exist in any event [1]—alter the fact that the determination of union disciplinary proceedings is a purely private function undertaken by the Administrator as a private actor pursuant to a relationship entered into between private parties—the IBT and its officials. *Cf. Blum v. Yaretsky*, 457 U.S. 991, 1008 & n.19 (1982) (private nursing home's decision to transfer and discharge patients to lower cost facilities was not state action, despite the fact that state regulations "encouraged" the home to transfer patients to "lower levels of care," because the ultimate decision to transfer was based on "medical judgments by private parties according to professional standards that are not established by the State."); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 356-59 (1974) (termination of service by a private utility did not constitute state action and, therefore, was not subject to constitutional review, notwithstanding that the utility was licensed and regulated by the government).

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[1] Wholly apart from the consent decree, the district court would have authority to review union disciplinary determinations under Section 102 of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 412. The scope of review of such internal disciplinary proceedings is strictly limited to a determination of whether the charged party received the full and fair hearing required by the LMRDA and whether there was merely "some evidence" to support the charge. *E.g., International Bhd. of Boilermakers v. Hardeman*, 401 U.S. 233, 244-47 (1971), *reh'g denied*, 402 U.S. 967 (1971); *Vars v. International Bhd. of Boilermakers*, 320 F.2d 576 (2d Cir. 1963); *see* 29 U.S.C. § 411(a)(5)(A). Similarly, internal interpretations of union constitutions are not subject to close scrutiny by the courts. *Felton v. Ullman*, 629 F. Supp. 251, 255 (S.D.N.Y. 1986). Here, the IBT has fully delegated its internal authority to interpret its constitution to the Independent Administrator. *United States v. International Bhd. of Teamsters*, 905 F.2d 610, 618-19 (2d Cir. 1990).

In support of the petition, petitioners have cited no case that conflicts with the court of appeals' decision. They merely dispute that court's conclusion that *Edmonson v. Leesville Concrete Co., Inc.*, 111 S.Ct. 2077 (1991), is "inapposite." (Pet. 12). In *Edmonson*, this Court held that peremptory challenges exercised by a private party in a civil case amounted to state action because the jury selection process involves the "performance of a traditional function of government," the resultant jury is a "quintessential governmental body," and the power to challenge a juror could not exist "absent overt, significant assistance" from the government. 111 S.Ct. at 2084-85. By contrast, the union disciplinary proceedings at issue in this case do not involve any governmental function, the exercise of any governmental powers, or the delegation of any governmental authority. Because the IA's determinations involve no more "state action" than would precisely the same determinations by the IBT General Executive Board for whom he substitutes, the court of appeals correctly distinguished this case from this Court's recent decision in *Edmonson*.

II. THE COURT OF APPEALS' ALTERNATIVE HOLDING REJECTING PETITIONERS' CONSTITUTIONAL CLAIMS WAS ALSO CORRECT

A. Petitioners argue that expelling them from the union because of their ties to organized crime violated their First Amendment right to freedom of association. (Pet. 17-19). Petitioners do not dispute the IA's factual findings regarding the nature of their association with organized crime: Senese "was and is a member of La Cosa Nostra" and Talerico traveled under an assumed name to meet an organized crime figure to exchange packages or envelopes on a number of occasions. (C.A. App. A1192, A1205). As this Court has noted, the union and the public at large have a compelling interest in eliminating the " 'public evils' of 'crime, corruption, and

racketeering' " in union activity, *Brown v. Hotel and Restaurant Employees and Bartenders Int'l Union Local 54*, 468 U.S. 491, 508 (1984) (citation omitted), that more than outweighs petitioners' purported "right" to exercise power as union officials while engaging in extensive association with known members of organized crime.

B. The courts below were also correct in rejecting petitioners' contention that the sanction violated their Fifth Amendment due process rights. Petitioners' constitutional challenge to the admission of hearsay evidence should be swiftly rejected. It is well settled that outside the context of criminal trials, reliable hearsay is admissible; procedural due process does not require adherence to strict evidentiary standards. *E.g., Richardson v. Perales*, 402 U.S. 389 (1971) (procedural due process was not violated by the government's introduction of medical reports as reliable hearsay at administrative hearing on a claimant's eligibility for disability benefits). In this case, the hearsay evidence was admitted only after petitioners, who were represented by counsel, had been provided notice of the charges against them and copies of the written testimony and exhibits that the Investigations Officer intended to use against them. Accordingly, petitioners have suggested no basis for questioning the court of appeals' decision, much less a reason for reconsidering settled precedent in this Court.

Petitioners have also argued that they were denied fair notice that associating with members or organized crime would "bring reproach upon the union" and, thus, that their conduct contravenes the disciplinary provisions of the IBT constitution. The traditional constitutional test for vagueness is whether the challenged regulations "are set out in terms that the ordinary person exercising common sense can sufficiently understand and comply with. . . ." *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 579 (1973). Even

if the regulations may be "vague in some hypothetical peripheral application," they will withstand challenge when applied to conduct that would ordinarily be understood to come within their reach. *Howell v. State Bar of Texas*, 843 F.2d 205, 208 (5th Cir. 1988), *cert. denied*, 488 U.S. 982 (1988). In this case, the charged and proven conduct—membership in and association with organized crime—was clearly contrary to the proscription against conduct "bring[ing] reproach upon the union," however uncertain the reach of that proscription may be at the margins.[2] The lower court decisions denying petitioners' vagueness claim were therefore clearly correct.

C. Petitioners' final constitutional argument—that the sanctions imposed by the IA violate the Eighth Amendment's prohibition against "cruel and unusual punish-

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[2] Petitioners also argue that because they were not signatories to the consent decree, it was an unconstitutional interference with their "contract" with the IBT to subject them to charges initiated by the Investigations Officer and adjudicated by the IA. In rejecting precisely the same argument raised by other disciplined IBT officials, the Second Circuit concluded that those officials, like petitioners, were bound by the decree:

> because the investigating and disciplinary powers of the court-appointed officers are proper delegations of the powers of the IBT General President and the GEB [General Executive Board] within the scope of the IBT Constitution that binds all members of the IBT, and because the IBT Constitution, in Article XXVI, section 2, contemplates amendment by the GEB, under the circumstances of this case, as a result of judicial direction.
>
> * * * *
>
> In this case, [the official] was subject to disciplinary oversight both before and after the entry of the Consent Decree, and the IBT merely exercised its discretionary authority under the [IBT] Constitution to delegate the investigation and discipline of union misconduct to court-appointed officers.

United States v. International Bhd. of Teamsters, 905 F.2d 610, 622-23 (2d Cir. 1990).

ment"—is frivolous. The sanctions do not constitute "punishment," as they were imposed by a private party following his resolution of disciplinary charges to which the government was not a party. *See Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) (Eighth Amendment inapplicable to civil suits between private parties). Even if the union disciplinary proceeding had not been a purely private dispute, but had been initiated by the government, the sanctions imposed in this case would not be "so punitive as to 'transfor[m] what was clearly intended as a civil remedy into a criminal penalty.'" *United States v. Ward*, 448 U.S. 242, 249 (1980) (quoting *Rex Trailer Co. v. United States*, 350 U.S. 148, 154 (1956)). Finally, even if they could somehow be construed as "punishment" for constitutional purposes, the sanctions imposed in this case would not be so disproportionately harsh as to constitute punishment that is "cruel and unusual" under the Eighth Amendment. Petitioners cite no cases in which sanctions less harsh than death or incarceration have been adjudged to be constitutionally excessive, and even "*successful* challenges to the proportionality of particular [prison] sentences [will be] exceedingly rare." *Solem v. Helm*, 463 U.S. 277, 289-90 (1983) (emphasis in original). Far from excessive, the lifetime suspension of petitioners from the IBT, together with the bar on their receipt of future compensation from the IBT, was entirely reasonable in light of the aim of ridding the IBT of organized crime influences.

Petitioners do not assert that the decision of the court of appeals conflicts with any ruling of any other court of appeals. Moreover, the issues presented by petitioners are unique to the temporary arrangement established by the 1989 consent decree between the IBT and the United States. Under the terms of the decree, the authority of the IA and the Investigations Officer will expire this year, nine months after the recent union election results

are certified. (Consent Decree 3). This case thus presents no issue of continuing importance warranting further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: February 3, 1992